United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

77-7215

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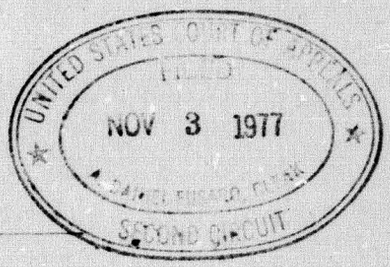
UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT



JAY BLUM,

Plaintiff-Appellant

vs.

PROBATE COURT OF CHITTENDEN COUNTY, et al.,

Defendants-Appellees

CIVIL APPEAL

Docket No. 77-7215

BRIEF OF PLAINTIFF-APPELLANT

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. The District Court erred in ruling that Plaintiff's Complaint against the various Defendants failed to state a claim upon which relief can be granted.

II. The District Court failed to give appropriate consideration to the Plaintiff's Amended Complaint.

III. The District Court erred in determining that 28 USC Section 2241 did not provide a basis for relief.

IV. The District Court erred in ruling that the full faith and credit clause of the United States Constitution, Article IV, Section 1 barred the relief sought by Plaintiff-Appellant.

STATEMENT OF THE CASE

A.

PROCEDURAL HISTORY OF THE CASE

Plaintiff's action was commenced in the United States District Court for the District of Vermont by Complaint dated June 4, 1976. The action sought relief under 42 USC Section 1983 and 28 USC Section 2241 and challenged the actions of the Defendants in arranging and granting the adoption of Appellant's minor son, Dan Blum, by Defendants Dale and Jean Goldhaber. The original Complaint was amended on June 22, 1976 to substitute Joseph Handy for Paul Philbrook as Vermont Commissioner of Social Welfare. The June 22, 1976 amendment did not alter the operative allegations of Plaintiff's Complaint. Defendant Robert Polworth, Clerk of the Superior Court, was dismissed from the action on August 3, 1976. The remaining Defendants (Goldhaber, Cain and Handy) filed motions to dismiss Plaintiff's action under Rule 12(b)(6) F.R.C.P.

On December 21, 1976 a hearing was held on these Motions. Significantly, on that same date, Plaintiff filed a Motion to Amend his Complaint to add, delete and substitute certain allegations in the original Complaint. This Motion was granted by the Court (see Transcript of hearing, December 21, 1976 at 12).

In an Opinion and Order dated February 22, 1977, the Court dismissed the action and Plaintiff filed Notice of Appeal on March 21, 1977. Prior to that, on March 4, 1977, Plaintiff filed a Motion to Amend the Findings and Judgment of the Court which was denied on April 21, 1977. Plaintiff filed a Notice of Appeal from that decision on April 15, 1977. It should be noted that on December 21, 1976 Appellant's counsel filed a Motion to Withdraw which was denied by the Court on the December 21 hearing date. Subsequently, Appellant's counsel filed a Motion on March 15, 1977 to withdraw, which was granted on March 28, 1977. Thereafter, until the undersigned's appointment by this Court on September 7, 1977 as counsel, pursuant to the Criminal Justice Act, Appellant proceeded on a pro se basis.

It is significant to observe this fact because Appellant, who has no formal training in the law, filed two appeals in this action, one on March 21, 1977, appealing the Court's February 22, 1977 Opinion and Order. This appeal was as to all Defendants. The second appeal was on May 15, 1977 which appealed the Court's April 22, 1977 denial of Plaintiff's Motion to Amend Findings and Judgment. However, this May, 1977 appeal was not taken as to Defendants Polworth and Goldhaber.

On June 20, 1977 Appellant filed a Motion to Consolidate the appeals, which the Court granted on July 7, 1977. In the June 20, 1977 Motion to Consolidate, Appellant, acting pro se,

also requested the Court to dismiss all Defendants except Defendants Cain, Handy and Probate Court of Chittenden County. Appellant believes that Defendants Goldhaber oppose the request to dismiss them from this appeal and as appears hereinafter, Appellant, through his counsel, believes that error was committed by the District Court in respect to the dismissal of the Complaint against Goldhabers and, therefore, Appellant withdraws his request contained in the Motion of June 20, 1977 to consolidate the appeals, to dismiss Defendants Goldhaber from the case. It should be noted that the July 7, 1977 Order of this Court simply granted Appellant's motion for consolidation of the appeals and did not take any action with respect to the somewhat cryptic and well-veiled Motion relative to the dismissal of the Defendants Goldhaber. Since Appellant believes the Court has not directly acted on that aspect of the June 20, 1977 Motion, the request to dismiss Defendants Goldhaber is hereby withdrawn nunc pro tunc.

ARGUMENT

I. THE DISTRICT COURT ACTED UPON AN ERRONEOUS SET OF FACTS IN GRANTING THE MOTIONS TO DISMISS IN ITS ORDER AND OPINION OF FEBRUARY 22, 1977.

It is important to observe that Defendants Coldhaber, Cain and Handy filed Motions to Dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) F.R.C.P.

It is axiomatic that in passing on motions to dismiss under Rule 12(b)(6) all allegations of the Plaintiff's Complaint and any amendments thereto must be construed favorably to the Plaintiff. See Scheuer v. Rhodes, 94 S Ct 1683 (1974). The Complaint must be construed in the light most favorable to the Plaintiff, together with any inferences that can be drawn from the Plaintiff's pleaded facts and a motion to dismiss should not be granted if it is reasonably conceivable that the Plaintiff may establish a cause of action pursuant to his pleadings. See Arfons v. E.I. DuPont De Nemours, 261 F. 2d 434 (2nd Cir. 1958).

Of crucial importance on Plaintiff's appeal herein is that the Court completely failed and neglected to take into consideration the Plaintiff's Amended Complaint which was submitted to the Court on December 21, 1976 and granted by the Court on that same date. The Court's understanding of the facts before it is set forth in pages 2 and 3 of the Court's

February 22, 1977 Opinion. It is abundantly clear from reviewing that portion of the decision that the Court failed to consider the December 21 pleadings. The Court spent a great deal of time at the hearing on December 21, 1976 considering whether to grant the Amended Complaint (see Transcript, 4-7). Then the Court, after receiving no objection to the Motion by Defendants Goldhaber, Cain and Probate Court, granted the Motion (see Transcript at 12). However, it is apparent that the Court failed to appreciate the gravamen of the pleading since at page 23 of the Transcript the Court referred back to the original Complaint, as amended to include Defendant Handy, and orally evidenced the Court's belief that the Plaintiff failed to appear at a crucial time in the Massachusetts proceedings attacked in the instant action which was the cause of the Plaintiff's difficulty. That misapprehension of the facts continued throughout the Court's dismissal decision of February 22. For example, on page 3 of the Court's decision, the Court states that Plaintiff finds himself prosecuting this lawsuit primarily because of a grievous misjudgment he made in failing to appear and be heard at the final hearing in the Middlesex Probate Court in April, 1974. The December 21 pleading states in pertinent part that the Probate Court in Massachusetts granted the petition for termination of Plaintiff's parental rights without notice to Jay Blum and without holding

an evidentiary hearing of any kind. Further, the pleading recites that the basis for the Massachusetts termination decree was that Plaintiff consented to it. It is specifically pleaded in the December pleading that Jay Blum never consented to that termination petition and that he never consented in law or in fact to entry of a decree dispensing with his consent to an order terminating the necessity for consent to adoption of his son.

Footnote 2 of the Court's Opinion further demonstrates the misapprehension of the pleading which amended the Complaint.

Overwhelming evidence that the Court did not understand and take into consideration the December 21 Motion appears on page 12 of the Court's decision, where the Court recites in paragraph (g) of that page the allegations contained in the Complaint of June 22, 1976 at paragraph 18 of said Complaint. Paragraph 4 of the Motion to Amend the Complaint dated December 21, 1976 deleted paragraph 18 and substituted a completely different paragraph in its place. Consequently, it is absolutely clear that the Court failed to consider the pleadings which dramatically changed the basis upon which Plaintiff's action proceeded. It should be clarified that when the Court in its February 22 decision refers to the "amended" Complaint, it is referring to the June 22, 1976 amended, whereby Joseph Handy was substituted for Paul

Philbrook as Vermont Commissioner of Social Welfare. Construing the pleadings that were before the Court and the inferences to be drawn therefrom in favor of the Plaintiff, as the District Court must do under Rule 12(b)(6), it is clear that Plaintiff's claim subsequent to December 21, 1976 attacked not only the sufficiency of notice in the Massachusetts proceeding but also the fact of notice. Fairly construed, the state of Plaintiff's pleadings before the Court when the Court dismissed the action were that the Massachusetts Probate Court had terminated Plaintiff's parental rights without notice to the Plaintiff, without an evidentiary hearing at which the Plaintiff had an opportunity to defend himself and without the consent in law or fact by the Plaintiff to the action of the Massachusetts Probate Court. Thus, the case proceeded on not only a sufficiency in law attack relative to the Massachusetts statutory procedures but also mounted a factual attack upon whether the rudiments of due process had ever been observed in Massachusetts by Plaintiff's claims that he had not been notified and had no opportunity to defend against the Massachusetts decision.

The significance of the amendment is of extraordinary importance to Plaintiff since the Constitutional dimensions of due process require notice and an opportunity to be heard appropriate to the nature of the case and adequate to safeguard

the right for which the Constitutional protection is invoked. See Armstrong v. Manzo, 380 U.S. 545, 550 (1965); Griffin v. Griffin, 327 U.S. 220, 234 (1946); Link v. Wabash Railroad Co., 370 U.S. 626, 632 (1961), re-hearing denied, 371 U.S. 873 (1962). In short, if the Court considered the pleadings appropriately, the Complaint, as amended, would clearly have stated a claim on which relief can be granted and the 12(b)(6) Motions filed by the Defendants should have been summarily denied. The failure of the Court to appropriately consider the posture of the Plaintiff's pleadings constitutes reversible error.

When Appellant received the February 22, 1977 Opinion and Order, he moved to amend the Findings and Judgment on March 4. In the Memorandum submitted to the Court in support of this Motion (document #31), Blum told the Court that no hearing was ever held in Massachusetts, stated that he did appear at the Massachusetts Court on April 4, 1974 but that a hearing was never held on that day, and also advised the Court that he had not received further notice of the Massachusetts proceedings in a manner which provided him an opportunity to defend himself concerning them. Despite this information given to the Court, the Motion to Amend the Findings, which the Court considered as a Rule 59 F.R.C.P. motion, was denied by the Court.

Perhaps the most graphic example of the District Court's complete misapprehension of the nature and character of the pleadings before it appears in the Court's decision at page 11 where the Court stated:

> "Here, by Plaintiff's own admission, notice was given, an opportunity to be heard was provided and Plaintiff, of his own volition--failed to appear."

Comparison of this statement with paragraphs 1, 3, 4 and 5 of the Motion to Amend the Complaint (document #18) shows first that the Court did not consider the Amended Complaint despite granting it on December 21, 1976 and secondly, that the Complaint, as amended, clearly states a claim upon which relief can be granted under the settled doctrine of due process set forth in Griffin, Manzo and Wabash Railroad. Under Rule 12(b)(6), the Court clearly has no power to sift and weigh the allegations contained in the pleadings; The Court cannot determine which pleadings are true and which should not be considered as true since the obligation of the Court is to construe all pleadings in view of the party opposing the Motion. This consideration, together with the doctrine that motions to dismiss for failure to state claims upon which relief can be granted, are viewed with disfavor by the Courts and that they should be granted sparingly and with caution further highlights the Court's erroneous action. See Arthur H. Richland Co. v. Harper, 302 F. 2d 324 (5th Cir. 1962); Dann v. Studebaker-Packard Corp., 288 F. 2d 201 (6th Cir. 1961), disapproved on other grounds sub nom. J. I. Case Co. v. Borak, 377 U.S. 426 (1962).

II. THE DISTRICT COURT IMPROPERLY DISMISSED THE PLAINTIFF'S CLAIM AGAINST THE DEFENDANTS GOLDHABER.

The Court ruled that the Complaint stated no cognizable cause of action against Defendants Goldhaber under 42 USC Section 1983 or 28 USC Section 2241. The Court arrived at this decision for two reasons. First, it erroneously construed the facts to conclude that there was no illegal detention present in the case before this Court. Appellant has dealt with the Court's mistaken impression of the state of the pleadings previously and those comments are fully applicable in this context. In addition, the Court, it is submitted, failed to appropriately consider the question whether Section 2241 provided a basis for relief against the Goldhabers. It is submitted that the Court clearly misread the case of Nguyen Dayen v. Kissinger, 528 F. 2d 1194 (9th Cir. 1975). The District Court took the position that the question of subject matter jurisdiction under Section 2241 turns in part on the degree of governmental involvement in facilitating and maintaining the allegedly illegal custody exercised by the prospective defendant. See Opinion at 6, 7. However, the Court in Kissinger specifically held:

> "Detention need not be by governmental authority to confer 2241 jurisdiction. The Federal Habeas statute predicates the exercise of Federal Habeas jurisdiction not on the character of the custodian, but on that of the custody: 'In violation of the Constitution or laws. . . of the United States.'" See 528 F. 2d at 1202.

The District Court's analysis of Kissinger indicated that habeas jurisdiction was proper in that case where the government was "deeply involved in the entire operation". However, it is submitted that the thrust of the Kissinger decision is that if a private detention rises to the level of a Constitutional violation, Federal habeas jurisdiction is appropriate. It is submitted that Appellant's claims, properly considered, obviously meet these prerequisites at the pleading stage of the case. Appellant has alleged that the Massachusetts Order denied him reasonable notice and inadequate opportunity to be heard in connection with the termination of his parental rights thus violating his Constitutional right to due process. See Armstrong v. Manzo, supra.

Kissinger, of course, did not forge new ground in the area of Section 2241 relief. In Preiser v. Rodriguez, 411 U.S. 475, 484-86 (1973), the Court indicated that the "essence of habeas relief" is an attack upon the legality of the custody and that over the years, habeas relief has evolved as a remedy available to effect the discharge from any confinement contrary to the Constitution or fundamental law. See also Peyton v. Rowe, 391 U.S. 54, 58 (1968) where the Court indicated that the writ is a procedural device for subjecting executive, judicial and private restraints on liberty to judicial scrutiny.

In Jones v. Cunningham, 371 U.S. 236, 238-40 (1963), the Court indicated that a resort to English common law was pertinent to assist in marking the boundaries in which the writ can be used. Resort to English common law reveals at least two instances where detention analogous to the detention challenged here was made subject to the writ of habeas corpus. In Rex v. Clarkson, 93 Eng. Rep. 623 (K.B. 1722) the writ of habeas corpus was held appropriate to question whether or not a person was being restrained by her civil guardians in an illegal fashion.

Similarly, in Earl of Westmeath v. Countess of Westmeath, 37 Eng. Rep. 842 (1821), a parent was granted the right to use the habeas writ to obtain his child from the other parent even though the child was not under duress, restraint or imprisoned in any manner.

In Ford v. Ford, 371 U.S. 187 (1962), the Supreme Court considered a habeas corpus petition where the husband had brought an action against his estranged wife to obtain custody of the children and asserted a Constitutional defect in the manner by which the wife held the children. In sum, Plaintiff submits that the key inquiry as respects private detention under Section 2241 is not the degree of governmental involvement as conceived by the District Court, but rather the question of the Constitutionality of the detention as measured by standards

set forth by the United States Constitution and cases decided thereunder. In addition, as indicated in Preiser v. Rodriguez, supra, if a fundamental right is abrogated by the confinement, Federal habeas relief exists. In Stanley v. Illinois, 405 U.S. 645 (1972), the Supreme Court clearly emphasized the importance of the family unit and parent-child relationship. See also Alsager v. District Court of Polk County, Iowa, 384 F. Supp. 643 (S.D. Iowa, 1974) reversed 518 F. 2d 1160 (8th Cir. 1975), 406 F. Supp. 10 (S.D. Iowa, 1975), affirmed 545 F. 2d 1137 (8th Cir. 1975).

Because of the District Court's failure to appropriately consider Section 2241 relief, it did not decide the question of exhausion of available state remedies. Decisional law has superimposed an exhausion requirement upon parties in order to accommodate principles of federalism. See United States Ex Rel Scranton v. State of New York, 532 F. 2d 292, 294 (2d Cir. 1976). However, the Court did indicate at page 4 of its Opinion that Blum's opportunity to appeal the Massachusetts decree has long since expired and it is now too late to appeal in Vermont as well. Moreover, the petition and order contained in the record upon appeal (document #8) indicates that Blum has no process open to him in the Massachusetts State Court since he has already been denied leave to appeal out of time from the decree of the Massachusetts Court. Also, Blum is out of time for purposes of filing a Rule 60(b) motion under Massachusetts

Rules of Civil Procedure, since the Massachusetts decree was in August of 1974 and the Rule's time limit is one year. Furthermore, Blum has no recourse under the Massachusetts Habeas Corpus statute (Massachusetts General Laws, Chapter 248, Sections 35-40) since the Goldhabers, who have present custody of the minor child of the Plaintiff, are in Vermont and a Massachusetts court would have no personal jurisdiction over them. In sum, it appears abundantly clear that Appellant has exhausted all requirements for exhaustion of state remedies insofar as his exhaustion obligations under Massachusetts law are concerned.

With respect to the question of whether exhausion in Vermont should be considered, it is important to utilize this Court's previously stated reasoning behind the exhaustion doctrine. In Fielding v. Lefevre, 548 F. 2d 1102 (2d Cir. 1977) the Court indicated that:

> "State courts must be afforded the right to set their own constitutional houses in order before the power of the Federal courts is invoked."

Similarly, in U.S. ex rel Sero v. Preiser, 506 F. 2d 1115 (2nd Cir. 1974) cert denied 421 U.S. 921 (1975) the Court indicated that the important consideration behind exhaustion is a consideration of federalism which makes it clear that it is wise for the Federal court to decline to inject itself

into the orderly administration of the state's judicial business. In this context, it is extremely important to observe that the essential focus of the Appellant's claims here challenge Massachusetts procedures and the full faith and credit, if any, to be afforded them by the Vermont Defendants. Thus, the essential attack is on the Massachusetts procedures and the facts which arose in Massachusetts. Exhaustion, as previously indicated, has already been accomplished in Massachusetts and, it is submitted, it would do no violence whatsoever to the principles of federalism vis-a-vis Vermont to have this action continue in the United States District Court in Vermont. In fact, it will not do violence to the principles of comity to permit the Vermont Federal Court to determine the validity of the Massachusetts Court's decree, rather than the Vermont State Court. It is also important to observe in this context that one of the claims made by Appellant in this case is that the Vermont Probate Court and Defendant Cain have already once overlooked the question of the validity to be granted to the Massachusetts decree. Furthermore, since Appellant was not a party to the Vermont adoption proceeding whereby Defendants Goldhaber obtained rights to Appellant's son, he would lack standing to appeal in that case and the appeal from the adoption order, or any post-judgment motion to vacate it, would clearly be untimely. See Vermont Rules of Civil Procedure, Rule 60(b)

and Vermont Rules of Appellate Procedure 4. In any event, since the District Court took no consideration of the exhaustion question, the appropriate procedure would be to return the case to the District Court for a full, factual development of this question. See Lanis v. Wilson, 521 F. 2d 724, 728-29 (8th Cir. 1975). It is also important to observe that none of the Defendants raised exhaustion as a defense in this action.

It is also submitted that the Court erred in concluding that the Goldhabers did not act under color of state law. As previously indicated, the Plaintiff's allegations are entitled to great liberality of interpretation and Plaintiff submits that there are sufficient statements before the Court to substantiate the conclusion that there is stated against the Goldhabers a claim that they acted in violation of 42 USC Section 1983. In paragraph 2 of Plaintiff's original Complaint and the June 22 amended Complaint, it is stated that "Plaintiff challenges the constitutionality of Defendants-Respondents' actions in terminating the natural parental relationship existing between Plaintiff and his child. . . pursuant to standards and procedures which violate the First, Ninth and Fourteenth Amendments to the Constitution of the United States." In addition, a fair reading of Plaintiff's Complaint demonstrates an allegation that the Defendants Goldhaber acted in sufficiently close connection

with the Defendants so as to clothe them with "color of state law". It should be noted that this Court in the case of Town of Milton v. Brault, 527 F. 2d 730 (2nd Cir. 1975), considering the liberality with which the Court construes pleadings as set forth in its decision in Brault, Plaintiff submits that the District Court erred in concluding that there was no allegation of unconstitutional conduct "under color of state law" by Defendants Goldhaber.

The Courts have held that where the state authorizes, encourages, or creates an atmosphere where private interests deprive individuals of their Federal Constitutional rights or when functions performed by the state are delegated to private interests sufficient "color" under Section 1983 may exist. See Bond v. Dentzer, 362 F. Supp. 1373 (D.C. New York) reversed on other grounds (494 F. 2d 302) 2d Cir. cert. denied 419 U.S. 837; 15 Am Jur 2d Civil Rights, Section 18 and cases cited therein. Appellant submits that the Goldhabers, who are admittedly private individuals, acted and assisted so directly the Defendants in carrying out the unlawful actions in question that there is a sufficient nexus between them and the actions of the other Defendants so as to state a claim for relief under Section 1983 at least at this stage of the pleadings. It should be noted that the State acted as a "foster parent" in obtaining the custody of Plaintiff's minor child and then filed a consent to adoption of the child by the

Goldhabers with the Chittenden Probate Court. It is clear from the pleadings that Dan Blum was a ward of the State of Massachusetts and then became a ward of the State of Vermont by virtue of the transfer to the Vermont Agency of Human Services of the custody of Plaintiff's minor child by the Cambridge Family and Children Services. Thereafter, the Goldhabers obtained custody of Plaintiff's son by direct Order and action of the Defendants as pleaded in Plaintiff's Complaint. It is submitted that the functions of parent and custodian of Plaintiff's minor child have been delegated to or performed by private individuals, namely the Goldhabers, in this case to a sufficient extent so as to clothe them with color of state law under the cases, especially and particularly at this early stage of the proceedings where no factual development exists.

For the above reasons, Plaintiff submits that the Order dismissing the Goldhabers should be reversed.

III. THE COURT ERRED IN DISMISSING DEFENDANTS CAIN AND THE PROBATE COURT OF CHITTENDEN COUNTY.

The Court used essentially the same theories in determining that no claim against Defendants Cain and Probate Court of Chittenden County existed. The theory of the Court was that the Massachusetts decree upon which Plaintiff has predicated his Constitutional attack was entitled to full faith and credit under the United States Constitution, Article IV, Section 1. The Court, as indicated previously, made this determination on an incomplete and erroneous understanding of the facts before it. The key to the Court's misapprehension of the facts is contained at page 12 of the Court's February 22, 1977 Opinion, wherein it sets forth seven areas where the record, according to the Court's understanding, indicated that Plaintiff had not alleged sufficient facts to justify relief. Analysis of that position by the Court with the true state of the pleadings as demonstrated particularly by the December 21, 1976 Motion to Amend reveals that the Court did not appropriately consider the Amended Complaint of December 21. The arguments made in connection with that matter previously are incorporated herein.

In addition, it is submitted that the Court failed to give appropriate weight to Alsager v. District Court of Polk County, Iowa, 406 F. Supp. 10 (S.D. Iowa, 1975). At page 12 of Judge Coffrin's Opinion, he indicates agreement with the

proposition that the quality of the notice given to Plaintiff was as poor at the notice proscribed in Alsager and was as vague and conclusory as the notice which the court in Alsager determined to be unconstitutional. See 406 F. Supp 10 at 25. After agreeing that the notice given Blum was defective by Alsager standards, the Court then curiously distinguished Alsager on what Appellant submits are inappropriate grounds. First, the Court reverted to its inaccurate position that Blum had notice of the proceeding which was to take place and voluntarily choose to depart to Israel after having notice of the proceeding. If the Court properly understood the facts, it is submitted that it would have denied the Defendants' motions on the grounds that Alsager was applicable.

Beyond that, the Court's position, even taking into consideration the factual inaccuracies of the Court's Findings, appears to be that a procedure which is defective because of the failure to provide notice consistent with due process is somehow validated and made constitutional by the failure of a person to contest the unconstitutionality in that proceeding. Thus, Judge Coffrin's Opinion seems to imply that there can be a waiver, by inaction, of constitutional rights. The fallacy of this reasoning is borne out in Alsager where there was no constitutional challenge to the action of the state in the initial proceeding which went to the Iowa Supreme Court (see 201 N.W. 2d 727 (Iowa, 1972)). The failure to raise these

defenses on the state level in Alsager did not prejudice or deprive the Alsagers from raising those questions in the Federal forum. The Court's position that "any possible inadequacy in due process which the Massachusetts Probate Court visited upon Jay Blum was outweighed by the inadequacy of Jay Blum's own handling of his responsibilities" (February 22, 1977 decision at 13) is, it is submitted, wholly illogical. To adopt this position is to say that a defective constitutional proceeding may be made invulnerable to a due process attack, either direct or collateral, by an inadequate response of the party aggrieved by the due process violation. This position clearly flies in the face of the settled doctrine that a waiver of constitutional rights must be clearly, knowingly and intentionally made.

Consequently, it is submitted that the Court erroneously dismissed Defendants Cain and Probate Court by misapprehending the facts before it and by arriving at an improper distinction between Alsager and the case before this Court. Again, Appellant has never had the opportunity before the Massachusetts Court or the Vermont Federal District Court to raise the central issue to his claim, namely that the due process clause of the Constitution bars the exercise of full faith and credit to the Massachusetts termination decree. This has not yet been fairly entertained and determined by the Federal Court on an appropriate exposition of the facts.

IV. THE COURT INAPPROPRIATELY DISMISSED DEFENDANT HANDY.

Plaintiff's Complaint claims that it was because of the direct actions of the Vermont Agency of Human Services that the Cambridge Family and Children Services transferred custody of Plaintiff's son to Vermont. This in turn led to the Goldhabers adoption of the child by Order of the Chittenden Probate Court which was consented to by the Vermont Agency of Human Services. If the Order acted on by Commissioner Handy dated August 29, 1974 from the Middlesex (Massachusetts) Probate Court, was an Order not entitled to full faith and credit, it follows therefrom that Handy's actions had no validity, since the sole source of Handy's power and authority to obtain custody of Dan Blum and transfer it by his consent to the Goldhabers is the Massachusetts Order. Once again, the dismissal of Handy revolves around the proper analysis of the facts that were before the Court when the Court acted. Therefore, the arguments made earlier with respect to the Court's misunderstanding of the pleadings are fully applicable here.

CONCLUSION

The action taken by the District Court in its February 22, 1977 Order and the Order subsequent thereto on April 22, 1977 have effected an extremely harsh result upon the Appellant. The close judicial scrutiny which is required of the courts in exercising actions pursuant to Rule 12(b)(6) was, Appellant submits, not observed in this case. In addition, the Court misapprehended the utility and flexibility of the Habeas Corpus statute. The relief sought by the Appellant herein is a reversal of the District Court's decisions, a determination that the writ of habeas corpus applies as to the Defendants Coldhaber and a remand of the action to the United States District Court for the District of Vermont. In connection with the remand, Appellant requests and suggests to the Court that the action be transferred to another United States District Judge to sit on further matters as regards the Appellant's case. This suggestion is by no means made out of any ill feeling or antagonism felt by Appellant toward the District Court Judge, but rather is made because the Court's decisions evidence a particular understanding and determination of the facts in this case which Appellant, as indicated many times in this Brief, strongly disputes.

In the interests of justice, Appellant would request that the case be transferred to another District Court Judge in Vermont for a "new look" at the Plaintiff's claims.

Dated: October 28, 1977.

VALSANGIACOMO, HEILMANN & DETORA

By _____
Thomas F. Heilmann, Esq.
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Appellant